Supreme Court, U. S.
FILED
AUG 25 1976
MICHAEL RODAK, JR., CLERK

No. 75-1781

In the Supreme Court of the United States

OCTOBER TERM, 1976

SAM HEMINGWAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of operating an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners Sam Hemingway, Charles Paul Lawson and Samuel McCollum were sentenced to four years' imprisonment; petitioners Clayton Joseph and Alvin Holmes were sentenced to six months' imprisonment, to be followed by thirty months' and two years' probation respectively; petitioners Lula Mae Holmes, Eva Joseph, and Rosetta Perkins were sentenced to three years' probation; and petitioner Ruth Hemingway was sentenced to two years' probation. The court of appeals affirmed (Pet. App. A, pp. 77-80).

The evidence showed that petitioner Sam Hemingway, owner of the Three Spot restaurant in Live Oak, Florida, operated three numbers lotteries from June 1973 until February 13, 1974 (I Tr. 62, 92-93; II Tr. 263-264, 371,

390-392). The largest of the three, the Puerto Rican Lottery, had the same winning number as the legal lottery run by the Commonwealth of Puerto Rico. Hemingway announced the winning number in this lottery on Wednesdays (I Tr. 93-94). The evidence also showed that among the persons who helped operate this lottery or sold numbers for Hemingway were petitioners Clayton Joseph (I Tr. 93-97; II Tr. 358), Eva Joseph (I Tr. 165-167; II Tr. 390-392), Ruth Hemingway (II Tr. 386-387), Charles Paul Lawson (I Tr. 190-209; II Tr. 247, 250, 265, 416; III Tr. 426-428), Samuel McCollum (I Tr. 134-135, 189, 199, 213-220; II Tr. 239), Rosetta Perkins (I Tr. 121-124; II Tr. 294-295), and Lula Mae and Alvin Holmes (I Tr. 131-134, 214-216).

Petitioners contend (Pet. 25-65) that the affidavits submitted in support of the applications for warrants to search the Three Spot Restaurant and their respective residences did not show probable cause.[1] However, the affidavits disclosed that upon information supplied by six informants, whose reliability was shown, and corroborated by the observations of the F.B.I. agents conducting the investigation, the police had determined that petitioners Sam Hemingway, Clayton Joseph and McCollum conducted an illegal lottery from Hemingway's restaurant and that the other petitioners solicited customers for the gambling operation. The district court carefully evaluated the

[1]Petitioners failed to include this issue as a question presented, as required by Rule 23(1)(c) of the Rules of this Court, and have otherwise claimed that the sole issue presented is the question of "reasonable cause" for the nighttime execution of the warrants (Pet. 3, 71-73). In any event, petitioners Samuel McCollum and Rosetta Perkins lack standing to raise these claims because the district court granted their motions to suppress the evidence seized at their respective residences. See *Alderman* v. *United States*, 394 U.S. 165, 174. Similarly, petitioner Charles Paul Lawson lacks standing because nothing was seized at his residence.

significance and reliability of the information contained in the affidavits and properly held that there was probable cause.[2]

Petitioners also contend (Pet. 3-25) that the affidavits failed to show "reasonable cause" for the nighttime execution of the warrants, as required by Fed. R. Crim. P. 41(c), which provides, in the pertinent part, that the—

> warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.

The warrants permitted their execution "any time during the day or night" (Pet. App. A, p. 78). The F.B.I. executed them at approximately 12:30 a.m. on a Wednesday morning.

The affidavits in support of the applications for warrants stated that the various numbers runners delivered their business records for the week's sales of the Puerto Rican lottery to the Three Spot Restaurant after 11:00 p.m. on Tuesday evenings. These gambling records could have been moved easily and quickly from the Three Spot. Moreover, as the affidavits pointed out, the searches of the sellers' residences had to be conducted simultaneously with the search of the restaurant. Otherwise, the sellers would have been forewarned of the exposure of their scheme and could have destroyed records of the previous weeks' gambling operations (see Pet. 10, 13) and fled (Pet. App. A, p. 78). Thus, the courts below properly determined that the magistrate had had reasonable cause to

[2]We are lodging with the Clerk a copy of the district court's opinion and the affidavits of Special Agents Norman Ritz and Gary Ramsey, which supported the applications for all the warrants at issue.

authorize the execution of these warrants at night. Cf. *United States* v. *Harper*, 450 F. 2d 1032, 1044 (C.A. 5).[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[3]Since petitioners do not allege (Pet. 65-68) that any evidence introduced at trial was derived from the warrantless seizure and search of certain of their automobiles, their contention that these vehicles were improperly seized as contraband used in the gambling operation is not properly at issue on appeal from their convictions.